UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BNSF RAILWAY COMPANY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. _____________
	§	
FIRSTENERGY GENERATION, LLC f/k/a FIRSTENERGY GENERATION CORPORATION,	§	
	§	
	§	
	§	
Defendant.	§	

ORIGINAL COMPLAINT

1. In 2008, FirstEnergy Generation, LLC (f/k/a FirstEnergy Generation Corporation) ("FirstEnergy"), an operating subsidiary of FirstEnergy Corporation, sought to enter into a long-term transportation relationship with BNSF Railway Company ("BNSF") to execute its then-existing business strategy of expanding generation output from its competitive (*i.e.*, non-regulated) coal-fired power plants. Specifically, FirstEnergy sought to lock in long-term transportation rates to ship coal from mines in Wyoming and Montana to FirstEnergy's coal-fired power plants in Ohio. As explained below, FirstEnergy entered into three agreements with BNSF. The agreement at issue in this action is between FirstEnergy and BNSF and is known as the Supplemental Rail Transportation Agreement (the "BNSF/FE Contract") (*see* App. 2-6).[1]

2. Under the BNSF/FE Contract, FirstEnergy committed to ship a defined minimum volume of coal each year and BNSF in turn agreed to provide defined allowances and rebates

[1] The BNSF/FE Contract and other contracts referred to herein are contained in an Appendix ("App."), which is being filed under seal due to the confidentiality provisions in those exhibits. Although the terms of the contracts are confidential, FirstEnergy has disclosed many details about some of the contracts in its public securities filings, including most recently in its 2016 Form 10-K, *available at* https://www.firstenergycorp.com/content/dam/investor/files/10-K/2016-10K.pdf (last visited Mar. 15, 2017).

based on the volume of coal FirstEnergy actually shipped in the given year. FirstEnergy agreed that if it failed to satisfy its minimum volume obligation in any year of the BNSF/FE Contract, it would pay liquidated damages for any minimum volume shortfall.

3. Shortly after entering into the BNSF/FE Contract, market conditions changed substantially and FirstEnergy changed its business strategy. Just one year into the BNSF/FE Contract, FirstEnergy announced that it would close several of the plants to which it had committed to ship the minimum annual volumes (although it is still operating one of the plants), and informed BNSF that it would immediately stop shipping coal to those destinations. FirstEnergy has shut down all but one of the plants covered by the BNSF/FE Contract and has failed to ship the minimum volume requirement under the contract. Additionally, FirstEnergy has also failed to pay liquidated damages on the shortfalls due under the BNSF/FE Contract, despite its contractual promise and obligation to do so. FirstEnergy has breached and repudiated the BNSF/FE Contract and is obligated to fully compensate BNSF.

Jurisdiction and Venue

4. This Court has original jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1332, and the amount in controversy exceeds $75,000.

5. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. § 1391(b)(2). FirstEnergy reached out to BNSF, a company headquartered in Fort Worth, Texas, seeking long-term rail transportation contracts, including the contract at issue in this dispute. FirstEnergy also negotiated the terms and conditions of those contracts with BNSF employees who are based in Fort Worth, and chose to enter into the long-term contractual relationship at issue here with a company headquartered in Fort Worth. The BNSF/FE Contract requires FirstEnergy to send annual certifications to BNSF in Fort Worth setting forth the amounts

of coal shipped under the agreement, and contemplates further communications with Fort Worth-based BNSF employees in administering the contract over its term. *See* App. 4, §§ 4, 7. Performance of the BNSF/FE Contract—like most rail transportation contracts—requires substantial communication between FirstEnergy and BNSF employees based in Fort Worth to schedule shipments and ensure that sufficient tons are shipped and reach their destinations at the proper time. In addition, FirstEnergy routinely communicates with Fort Worth-based BNSF employees regarding FirstEnergy's alleged breach of the contracts, and FirstEnergy employees have also traveled to the Dallas-Fort Worth area to discuss issues related to the contracts with BNSF employees. The BNSF/FE Contract also provides that if FirstEnergy fails to ship the minimum volume required, FirstEnergy shall pay liquidated damages to BNSF in Fort Worth.

The Parties

6. Plaintiff BNSF is a Class I railroad which operates one of the largest railroad networks in North America, covering the western two-thirds of the United States. BNSF provides freight transportation services across its rail network, including the transportation of coal. BNSF is a Delaware corporation with its principal executive offices at 2650 Lou Menk Drive, Fort Worth, Texas 76131.

7. Defendant FirstEnergy generates and sells power throughout the Mid-Atlantic and Midwest. FirstEnergy is an Ohio limited liability company with its principal executive offices located at 76 South Main Street, Akron, Ohio 44308. In 2015, FirstEnergy had assets valued at $52 billion and generated $15 billion in revenues. FirstEnergy operates in both regulated and competitive (or unregulated) markets.

8. FirstEnergy's coal-fired power plants in Ohio include those defined as Shipper's Plants under the BNSF/FE Contract. App. 3, ¶ 2; App. 9, § 4; App. 21, § 4. The Plants compete in

unregulated markets—meaning that the power prices they charge, and the revenues they receive, are dependent on market rates rather than a regulatory regime in which plants receive a guaranteed markup above costs.

Background

9. This action arises of out of Defendant FirstEnergy's breach and repudiation of certain long-term transportation agreements with BNSF.

10. In 2008, FirstEnergy wanted a long-term commitment from BNSF to move coal from mines in the west to be used at six of its coal-fired power plants in Ohio (together, the "Plants"). App. 3, ¶ 2 ("Shipper's Plants"). FirstEnergy was, at that same time, entering into a 15-year contract to purchase up to 10 million tons of coal annually from the Signal Peak mine in Montana (a mine in which FirstEnergy had an equity interest). *See e.g.*, FirstEnergy 2010 Annual Report at 6, *available at* https://www.firstenergycorp.com/content/dam/investor/files/annual-reports/2010/2010-Annual-Report.pdf (last visited Mar. 15, 2017). FirstEnergy looked to BNSF to transport the coal from that mine east for use at FirstEnergy's Plants.

11. Although BNSF services the coal mines in the west, its rail network does not extend so far east as to service the FirstEnergy Plants in Ohio. In these situations, BNSF partners with other railroads whose rail network services the shipper's destination, known as the "eastern carriers." BNSF and the other eastern carriers offer the shipper, such as FirstEnergy, a single "through rate" for transportation of freight between an origin on one railroad and a destination on the other railroad. The Plants were serviced by two different eastern carriers: CSX Transportation ("CSX") serviced four of the plants (*see* App. 8-18 ("CSX Contract")); and Norfolk Southern serviced the remaining two plants. *See* App. 20-30 ("NS Contract").

12. FirstEnergy and BNSF entered into several separate long-term contracts to govern the shipment of western coal to these six Plants. The CSX Contract governs the transportation of coal to four of the six plants FirstEnergy requested coal be shipped and it obligates FirstEnergy to ship a minimum number of tons of coal in the aggregate in each year of the contract to three of the four plants referenced in that contract, from the beginning of its term through 2025. App. 9-10, §§4, 8. The NS Contract governs the transportation of coal to the remaining two plants, and it obligates FirstEnergy to ship in each year of the contract a minimum number of tons of coal in the aggregate to those two plants, from the beginning of its term through 2025. App. 21-22, §§ 4, 9. The CSX Contract and the NS Contract are known together as the "Plant Agreements."

13. The third agreement, the BNSF/FE Contract, is separate from either of the Plant Agreements and is solely between FirstEnergy and BNSF, and is the contract at issue in this dispute. The BNSF/FE Contract obligates FirstEnergy to ship in each year of the contract a minimum volume of tons of coal, from the beginning of its term through 2025—and it does not allocate those required minimum volumes among the Plants. *See* App. 3, § 3. The BNSF/FE Contract is governed by Ohio law. *See* App. 5, § 9.

14. In exchange for FirstEnergy's commitment under the BNSF/FE Contract to ship this minimum volume of coal in each year, BNSF agreed to provide FirstEnergy certain financial incentives. The BNSF/FE Contract provides that if FirstEnergy meets and exceeds its minimum volume requirements in a given year, BNSF then is obligated to provide FirstEnergy certain financial allowances. *See* App. 3, § 2. And if FirstEnergy ships at a specific threshold higher than its minimum volume requirement in a given year, FirstEnergy is entitled to certain additional financial allowances from BNSF. *See id.*

15. The term of the BNSF/FE Contract is set forth in section 1 of the BNSF/FE Contract. *See* App. 3. Since the beginning of the contract term, FirstEnergy has never once met the minimum volume requirement under the BNSF/FE Contract, and has shown no intent to do so at any point in the future. Each year, FirstEnergy has shipped less and less coal under the BNSF/FE Contract to the point that it shipped less than 100,000 tons in each of the last two years, with a projected shortfall of tons for this coming year of at least 5.5 million tons.

16. In October 2011, FirstEnergy announced that it was selling a one-third interest in the Signal Peak mine, and thus revised its coal supply agreement with the mine to reduce substantially the amount of coal that it would take for its own use, down to virtually no minimum requirement and a maximum of only 2 million tons per year. Although FirstEnergy revised its agreement with the mine to reduce the volumes it was required to ***take***, it did not obtain a similar reduction to its commitment to BNSF to ***ship*** a minimum volume of tons in each year under the BNSF/FE Contract.

17. By 2012, mere months after FirstEnergy announced the sale of its interest in Signal Peak, FirstEnergy announced the retirement of all but one of the Plants. Soon thereafter, FirstEnergy attempted to walk away from its obligations under the Plant Agreements. Specifically, after announcing its decision to close the plants, FirstEnergy claimed force majeure under both of its Plant Agreements, stating that its decision to close the remaining Plants was the "result of the new Mercury Air Toxics Standards ('MATS') issued by the U.S. Environmental Protection Agency in December 2011," and that it would cease all coal deliveries the next day. FirstEnergy made this decision notwithstanding that the MATS regulation certainly did not require the Plants to shut down, and in fact did not even require compliance for several years hence. FirstEnergy's

actions in announcing in 2012 its decision to shut down the plants also disregarded the 14 years remaining under the terms of the Plant Agreements.

18. BNSF has disputed FirstEnergy's declarations of force majeure as to the Plant Agreements, and the Parties are currently litigating those issues in separate arbitration proceedings under the terms of those Plant Agreements. FirstEnergy has not paid any damages due for years 2015 or 2016 under the Plant Agreements.

19. The separate BNSF/FE Contract, however, imposes obligations on both BNSF and FirstEnergy distinct from either of the Plant Agreements, and also differs from those agreements in a number of other respects, including that it does not limit FirstEnergy's obligation to pay liquidated damages on minimum volume shortfalls for any reasons, including force majeure.

20. Since 2012, FirstEnergy has actually demolished certain of the Plants, and has stated publicly that even if the MATS regulation were to be reversed, FirstEnergy would still not reopen these plants. FirstEnergy will not satisfy the contractual minimum volume requirement in the future, particularly given its planned reduction in operations and unit shutdowns at its lone remaining plant in operation served under the BNSF/FE Contract. Specifically, FirstEnergy executives described its plans to shut down the plant not as a response to MATS, but rather as a response to challenging market conditions, and as a matter of economic viability. Indeed, that plant was already in compliance with MATS.

21. There is no dispute that FirstEnergy has failed to perform its obligations under the BNSF/FE Contract. Further, FirstEnergy has made clear that it has no intent to satisfy those obligations in the future, particularly given the retirements of all but one of the Plants. FirstEnergy has breached and repudiated the BNSF/FE Contract, and BNSF is entitled to damages.

22. FirstEnergy also has not paid the liquidated damages due under the BNSF/FE Contract, in further breach of the BNSF/FE Contract.

23. In this action, BNSF seeks: (1) a finding that FirstEnergy has breached the BNSF/FE Contract for each year of the BNSF/FE Contract, including by failing to ship an aggregate minimum volume of coal in both 2015 and 2016 satisfying its minimum volume obligation under the contract; (2) a finding that FirstEnergy has repudiated the BNSF/FE Contract for 2017-2025; and (3) an award of BNSF's damages resulting from FirstEnergy's breaches and repudiation of the BNSF/FE Contract.

Count I

Breach of Contract – Failure to Ship the Minimum Volume Requirement

24. BNSF incorporates by reference Paragraphs 1-23 above as if set forth fully herein.

25. The BNSF/FE Contract is a valid and enforceable contract between BNSF and FirstEnergy. BNSF has performed its obligations under the BNSF/FE Contract and remains ready, willing, and able to perform its future obligations under the BNSF/FE Contract.

26. The BNSF/FE Contract obligates FirstEnergy to load, or cause to be loaded, for shipment to the Plants a minimum volume of tons of coal per year through December 31, 2025.

27. FirstEnergy failed to ship the contractually required minimum volume of tons of coal each year through 2016, in breach of the minimum volume requirement of the BNSF/FE Contract.

28. BNSF has been harmed and will continue to be harmed by FirstEnergy's breaches of the minimum volume requirement of the BNSF/FE Contract.

29. BNSF is entitled to recover all damages resulting from FirstEnergy's breaches of the BNSF/FE Contract.

Count II

Breach of Contract – Failure to Pay Liquidated Damages

30. BNSF incorporates by reference Paragraphs 1-29 above as if set forth fully herein.

31. The BNSF/FE Contract is a valid and enforceable contract between BNSF and FirstEnergy. BNSF has performed its obligations under the BNSF/FE Contract and remains ready, willing, and able to perform its future obligations under the BNSF/FE Contract.

32. The BNSF/FE Contract obligates FirstEnergy to pay liquidated damages to BNSF for the amount of any shortfall in the coal shipped pursuant to the contract, to the extent FirstEnergy has not already paid for those shortfall tons under the Plant Agreements.

33. FirstEnergy has failed to ship the minimum volume requirement under the BNSF/FE Contract in each year of the contract term. FirstEnergy therefore owed liquidated damages to BNSF each year based the prior year's shortfall amount.

34. FirstEnergy has failed to pay the liquidated damages due to BNSF for shortfalls under the BNSF/FE Contract.

35. BNSF has been harmed and will continue to be harmed by FirstEnergy's breaches of the liquidated damages requirement of the BNSF/FE Contract.

36. BNSF is entitled to recover all damages resulting from FirstEnergy's breaches of the BNSF/FE Contract.

Count III

Breach of Contract - Repudiation

37. BNSF incorporates by reference Paragraphs 1-36 above as if set forth fully herein.

38. The BNSF/FE Contract is a valid and enforceable contract between BNSF and FirstEnergy. BNSF has performed its obligations under the BNSF/FE Contract and remains ready, willing, and able to perform its future obligations under the BNSF/FE Contract.

39. The BNSF/FE Contract obligates FirstEnergy to load, or cause to be loaded, a minimum volume of tons of coal per year through December 31, 2025.

40. FirstEnergy has repudiated the BNSF/FE Contract by its statements and actions, including: (1) closing five of its plants and ceasing all coal deliveries to those plants; (2) shipping well below the contractually required volume of tons of coal in each year of the contract term to date; (3) shipping no coal to five of its plants since 2014, and (4) announcing the retirement of four of the seven coal-fired units by 2020 at its one plant under the contract remaining in operation.

41. BNSF has been harmed and will continue to be harmed by FirstEnergy's repudiation of the BNSF/FE Contract.

42. BNSF is entitled to recover all damages resulting from FirstEnergy's repudiation of the BNSF/FE Contract.

PRAYER FOR RELIEF

BNSF respectfully requests that the Court:

(a) award BNSF its damages through 2025 for FirstEnergy's breaches and repudiation of the BNSF/FE Contract in an amount to be determined; and

(b) award BNSF such other and further relief as the Court deems just and proper.

March 16, 2017

Respectfully submitted,

/s/ Daniel T. Donovan

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